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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 384

WALTER GERMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR REMAND AND VACATION OF JUDGMENT

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It is hereby moved by counsel for petitioner, Louis Bender, Esq., pursuant to Rule 48 of the Rules of this Court, that as the action and judgment should abate and as the cause is now moot, the case should be remanded to the United States District Court for the Southern District of New York with instructions to vacate its order and judgment of August 15, 1966 (App. 45a)* and dismiss the proceeding. In support thereof, counsel shows unto the Court the following:

* Citations in the form "App. — a" refer to the record on appeal, a copy of which has been previously filed with this Court.

1. The present case is before this Court on petition for *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit entered January 12, 1967, affirming an order and Judgment of the United States District Court for the Southern District of New York entered August 15, 1966, which held in contempt the original petitioner, Walter Germann, and imposed a fine of $25,000.00 and a further cumulative fine of $1,000.00 a day to compel Mr. Germann to appear before a grand jury in the Southern District of New York. Although referred to below as a "civil contempt," the judgment contained no purge clause.

2. On or about the 14th day of September, 1967, a motion was filed by counsel to substitute the Konkursamt Basel-Stadt (Basel Bankruptcy Court) as party petitioner owing to the death of the original petitioner, Walter Germann. Mr. Germann was a Swiss national and resident at all times and the Konkursamt Basel-Stadt is the representative of his estate.

3. As the contempt proceedings below were initiated and prosecuted to compel Walter Germann to appear and testify before a grand jury in the Southern District of New York, the death of Mr. Germann has rendered the relief sought and obtained in the courts below moot.

4. The judgment below should also abate because it imposed a fine, the sole purpose of which was to punish and penalize the late Mr. Germann for his failure to reappear pursuant to the oral direction of the foreman of the May 1966 regular grand jury (App. 34a-35a, 45a).

5. The purpose of the contempt proceeding below was to compel the late Mr. Germann to travel from his home in Switzerland to New York City and there appear before a grand jury in the United States Court House for the South-

ern District of New York (App. 21a, 41a). The order and judgment of contempt entered below was designed to accomplish that purpose (App. 45a). As the relief sought in the proceeding now before this Court for review may no longer be afforded as a result of the decease of Mr. Germann, the cause should be remanded with instructions to vacate and dismiss the judgment on motion as this Court has held on many occasions. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 71 S. Ct. 104 (1950); *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 267-68, 57 S. Ct. 202, 205 (1936); *Brownlow* v. *Schwartz*, 261 U. S. 216, 43 S. Ct. 263 (1923); *Mills* v. *Green*, 159 U. S. 651, 654-57, 16 S. Ct. 132, 133-34 (1895); *Little* v. *Bowers*, 134 U. S. 547, 10 S. Ct. 620 (1890); *Singer Manufacturing Co.* v. *Wright*, 141 U. S. 696, 12 S. Ct. 103 (1891); *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360, 39 S. Ct. 512 (1919); *Heitmuller* v. *Stokes*, 256 U. S. 359, 41 S. Ct. 522 (1921); *Alejandrino* v. *Quezon*, 271 U. S. 528, 46 S. Ct. 600 (1926); *United States* v. *United States Tariff Commission*, 274 U. S. 106, 112, 47 S. Ct. 499, 502 (1927); *Atherton Mills* v. *Johnson*, 259 U. S. 13, 42 S. Ct. 422 (1922); *United States* v. *Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 239 U. S. 466, 478, 36 S. Ct. 212, 217 (1916); *Berry* v. *Davis*, 242 U. S. 468, 37 S. Ct. 208 (1917); *Codlin* v. *Kohlhausen*, 181 U. S. 151, 21 S. Ct. 584 (1901); *Brotherhood of Locomotive Firemen and Enginemen* v. *Toledo, Peoria & Western Railroad*, 332 U. S. 748, 68 S. Ct. 53 (1947); *Farmers Grain Co.* v. *Brotherhood of Locomotive Firemen and Enginemen*, 332 U. S. 748, 68 S. Ct. 53 (1947); *Taylor* v. *McElroy*, 360 U. S. 709, 711, 79 S. Ct. 1428, 1429 (1959); *Richardson* v. *McChesney*, 218 U. S. 487, 31 S. Ct. 43 (1910); *Hodge* v. *Tulsa County Election Board*, 335 U. S. 889, 69 S. Ct. 250 (1948).

6. The huge fine imposed upon the deceased Mr. Germann was a penalty for his failure to appear before the grand jury pursuant to the foreman's request. The pro-

ceeding was prosecuted by the United States Attorney's office in the name of the United States. There was no allegation of, attempt to prove, or compensation in the judgment for any damages incurred by the plaintiff. The only standard applied by the District Court to determine the magnitude of the fine it imposed was the supposed assets of Mr. Germann at the time of the judgment (see App. 37a-40a, 41a). This Court construed the nature of such a fine in *United States* v. *United Mine Workers*, 330 U. S. 258, 303-04, 67 S. Ct. 677, 701 (1947):

> "Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.
>
> "But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.
>
> "It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant." 330 U. S. 304, 67 S. Ct. 701.

7. Where the judgment imposes a fine which is a penalty, as in the present case, as distinguished from a monetary award intended to compensate the complainant for damages

suffered, the penalty should abate upon the death of the defendant. *McGovern* v. *United States,* 280 Fed. 73 (7th Cir. 1922); *United States* v. *Pomeroy,* 152 Fed. 279 (C.C. S.D.N.Y. 1907), rev'd. on other grounds, 164 Fed. 324 (2d Cir. 1908), cited with approval by this Court in *United States* v. *Johnson,* 319 U.S. 503, 520 n.1, 63 S.Ct. 1233, 1241 n.1 (1942) and *Singer* v. *United States,* 323 U.S. 338, 346, 65 S. Ct. 282, 286 (1945); *United States* v. *Dunne,* 173 Fed. 254 (9th Cir. 1909). The provisions of 18 U.S.C. §3565 that a fine or penalty portion of a judgment "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases" does not apply after the death of the defendant. *United States* v. *Pomeroy, supra; Crooker* v. *United States,* 325 F. 2d 318, 321 (8th Cir. 1963) and cases cited. The rationale for thus dealing with a judgment imposing fines and penalties was well stated by the *Pomeroy* decision, "if the money had been collected before his death, [the defendant] would have been punished. If it is collected now his family will be punished, and he will not be punished." 152 Fed. at 282. This principle has its source in our Constitution, U.S. Const., Art. III, §3, and our statutes, 18 U.S.C. §3563.

8. The statement in note 1, page 1, of respondent's memorandum in opposition to the petition for certiorari in this Court apparently was intended to avoid the result of the cases just cited. The contention is made that "a judgment for civil contempt does not abate by reason of the death of the defendant". The abatement of a judgment in a contempt case is not determined solely by applying the rubric of "civil" or "criminal". The line between the two types of contempt is a fine one. Cf. *Pino* v. *United States,* 278 Fed. 479 (7th Cir. 1921). The determinative factor on the question of abatement should be whether the contempt judgment imposes a penalty or is designed to compensate the plaintiff for damages suffered. The cases cited by respond-

ent such as *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551-52, 63 S.Ct. 379, 388 (1943); *Kirk* v. *Commissioner*, 179 F. 2d 619 (1st Cir. 1950); *United States* v. *Templeton*, 199 F. Supp. 179 (E.D. Tenn. 1961); are wholly inapplicable to the instant situation.* They deal with situations where the courts have determined that under specific statutes Congress has determined that double, treble or some other multiplication of damages pursuant to a legislative formulation is appropriate to compensate the Government for the harm at which the particular statute is directed. The contempt statute, 18 U.S.C. §401, is not such a statute but is a specification by Congress of the areas in which the contempt powers of the Federal courts may be exercised. The imposition of damages or penalty in an appropriate case is determined solely by judicially determined standards applied to the circumstances of the particular case. The court below which imposed the contempt judgment at no time considered a compensatory fine nor did it impose one. The fine it did impose was intended as a penalty to punish the late Mr. Germann for his failure to return before the May 1966 regular grand jury in response to the foreman's request.

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* Respondent cites three other cases in note 1 of the memorandum in opposition. (1) *Wasserman* v. *United States*, 161 Fed. 722 (8th Cir. 1908), which dealt with a contempt judgment imposed in a civil action for disobedience of an injunction in that suit. The holding in *Wasserman* that the fine would not abate on the death of the defendant, 261 Fed. at 724, is no longer the rule in the Eighth Circuit. *Crooker* v. *United States*, 325 F. 2d 318, 321 (8th Cir. 1963). (2) *Pino* v. *United States*, 278 Fed. 479, 482 (7th Cir. 1921) held that a contempt fine imposed for violation of an injunction against violating the National Prohibition Act was penal in nature, did not impose damages for the wrong committed, and abated on the death of the contemnor. (3) *Howard* v. *Wilbur*, 166 F. 2d 884, 886 (6th Cir. 1948), held moot a proceeding to disbar an attorney, who had died after the entry of the order of disbarment, reversed the judgment below and remanded the case with direction to dismiss the complaint.

9. The argument made in the memorandum in opposition does not deal with the fact that the proceeding below which was intended to force the deceased to appear and testify before a grand jury in the Southern District of New York is now moot. The proceedings can no longer achieve their purpose, the appearance of the deceased before the grand jury. The fine imposed can no longer achieve the end of punishing the deceased for his non-appearance nor of compelling that appearance.

WHEREFORE, it is respectfully prayed that an order be entered remanding the case to the United States District Court for the Southern District of New York with instructions that the judgment herein be vacated and the proceedings dismissed.

Respectfully submitted,

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